SUPREME COURT, U.S.
FILED
AUG 11 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 301

In the Matter of the Application of

AMERICAN CHICLE COMPANY,

Appellant,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

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THE STATE TAX COMMISSION OF THE STATE OF NEW YOR

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On Appeal from the Court of Appeals of New York

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment and remittitur the Court of Appeals of the State of New York (here after called "Court of Appeals") entered on April 1961, which, by a divided Court, affirmed an order of t Appellate Division of the Supreme Court of New Yo Third Judicial Department (hereinafter called "Appell Division") dated August 8, 1960. The Court of Appe is the highest Court of the State of New York availa to appellant. New York Constitution, Article VI, Section

Opinion Below

The Court of Appeals wrote no opinion, but did issue a Memorandum of its Decision reported at 9 N. Y. 2d 883 (Appendix A, pp. 23-24). The opinion of the Appellate Division is reported at 11 A. D. 2d 256 (Appendix C, pp. 27-30).

Jurisdiction

This is a proceeding to review appellee's determination, dated December 31, 1958, denying appellant's claims for refund of $34,323.52 constituting a portion of Article 9-A New York corporate franchise tax paid by it for the calendar years 1950 to 1954, inclusive.

Pursuant to and in accordance with Article 78 of the Civil Practice Act of New York, appellant timely petitioned the Supreme Court of Albany County, New York for review of appellee's rejection of appellant's refund claims. On appellant's petition the proceeding was transferred to the Appellate Division where the appellee's determination was confirmed with opinion (Appendix C, pp. 27-30). On appeal, the Court of Appeals, on April 27, 1961, affirmed the Appellate Division without opinion (Appendices A and B, pp. 23-26).

The order, judgment and decision of the Court of Appeals were adopted as the order, decision and judgment of the Supreme Court of the State of New York, Albany County, on May 26, 1961. Appellant has not filed a petition for reargument or rehearing in the Court of Appeals. Notice of Appeal was filed in the Supreme Court of the State of New York, Albany County, on July 12, 1961.

The jurisdiction of this Court over this appeal is conferred by 28 U. S. C. Section 1257(2). Decisions of this Court which sustain the jurisdiction of this Court to hear

this appeal include: (a) status of appellee's determination, for appeal purposes, as a state "statute", *Live Oak Water Users' Association* v. *R.R. Commission of California*, 269 U. S. 354; *Lake Erie & Western R. Company* v. *State Public Utility Commission*, 249 U. S. 422; *Lathrop* v. *Donohue*, —— U. S. ——, 81 S. Ct. 1826, 1828; (b) appellee's status as the State of New York under the Fourteenth Amendment, *Cooper* v. *Aaron*, 358 U. S. 1, 17; *United States* v. *Raines*, 362 U. S. 17; and (c) invalidity of appellee's determination under the Fourteenth Amendment, *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U. S. 412; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Morey* v. *Doud*, 354 U. S. 457; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535; *Air-way Electric Applicance Corp.* v. *Day*, 266 U. S. 71, 85; and *Hans Reese Sons, Inc.* v. *North Carolina*, 283 U. S. 123.

Statute and Regulations Involved

Section 210.3(a)(2)(B), Article 9-A of the Tax Law of the State of New York (Appendix D, pp. 31-32) and Article 413(2) of Regulations 9-A issued by appellee (Appendix E, pp. 33-35).

Questions Presented

The controversy in this case concerns appellant's corporate franchise tax liabilities under Article 9-A of the New York Tax Law for the calendar years 1950 to 1954, inclusive, and squarely involves the validity of appellee's action—based entirely on Article 413(2) of Regulations 9-A issued by appellee—in allocating to New York sales of appellant's merchandise made out of public warehouses in Jacksonville, Florida, Camden, New Jersey, and Cleveland, Ohio, during such calendar years.

The following questions are presented by this appeal:

1. Whether, to the extent that it bars a public warehouse outside the State of New York from being a "permanent or continuous place of business maintained by the taxpayer without the state", Section 210.3(a)(2)(B) of the Tax Law of the State of New York, as interpreted by Article 413(2) of Regulations 9-A issued by appellee, denies appellant equal protection of the laws and due process of law required under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. Whether, in determining appellant's Article 9-A franchise tax liabilities for the calendar years 1950 to 1954, inclusive, appellee denied appellant equal protection of the laws and due process of law required under Section 1 of the Fourteenth Amendment to the Constitution of the United States by allocating to New York for such years sales of appellant's merchandise made out of public warehouses in Jacksonville, Florida, Camden, New Jersey, and Cleveland, Ohio, during such calendar years.

Statement of Facts

The undisputed facts of this case may be summarized as follows:

Appellant is a leading manufacturer of chewing gum and related products which are sold throughout the world. Continuously since 1899 and down to the present time, appellant, a New Jersey corporation, has been validly doing business in the State of New York, maintaining its principal office, manufacturing plant and place of business in Long Island City, New York. During the calendar years 1950 to 1954, inclusive, appellant was engaged in the manufacture of about a dozen chewing gum and related products, selling its products to jobbers or wholesalers, but (except in the case of chain stores) not to retail stores.

Beginning in 1948 and continuing without interruption to the present time, appellant has transacted business at and from a public warehouse in Jacksonville, Florida. During the calendar years 1950 to 1954, inclusive, appellant shipped to that public warehouse substantial amounts of its manufactured products, maintaining at all times a substantial inventory at such warehouse. Out of that inventory, appellant ordered the shipping of its products to its customers in four southern States, namely, Florida, Alabama, Mississippi, and Georgia.

Beginning in 1954 and continuing without interruption to the present time, appellant has transacted business at and from a public warehouse in Camden, New Jersey, and at and from a public warehouse in Cleveland, Ohio, in a manner similar to that described above under the Jacksonville, Florida arrangement. The areas served by the Camden warehouse include North Carolina, South Carolina, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, and the District of Columbia. The area served by the public warehouse in Cleveland is limited to the State of Ohio.

For the years 1950 to 1954 and down to date, appellant's products have occupied approximately 1,600 square feet in the Jacksonville, Florida warehouse. Since 1954 appellant's products have occupied approximately not less than 1,600 square feet in the Cleveland, Ohio public warehouse, and approximately not less than 15,000 square feet in the Camden, New Jersey public warehouse.

For the calendar year 1954 the sales of appellant's products out of the three public warehouses totalled $4,334,748.57, all appropriated to orders at those warehouses and not in the State of New York. In every year since 1954, similar sales of appellant's products at those warehouses have substantially exceeded the 1954 sales. Appellant's customers in the area served by any one of the three public warehouses know that appellant's products shipped to them come out of that warehouse.

During the calendar years 1950 to 1954, the Jacksonville public warehouse had at least two of its full-time em-

ployees receiving, storing, handling and shipping appellant's products. During the calendar year 1954, the public warehouse in Camden utilized five of its full-time employees to receive, store, handle and ship appellant's products; and in Cleveland, two public warehouse employees were engaged in similar work.

As a New Jersey corporation, appellant has paid all taxes assessed against it by the State of New Jersey, including the New Jersey franchise tax based, in part, on sales from the Camden public warehouse and upon the merchandise stored there. Since 1948 appellant has been continuously qualified to do business in Florida, has had an occupancy license in Jacksonville, and has paid Florida franchise tax based on sales made out of the Jacksonville warehouse. In 1954 and continuously since then, appellant has been duly qualified to do business in Ohio and has been continuously required to have sales of its products out of the Cleveland public warehouse treated as Ohio sales for Ohio franchise tax purposes.

Since the end of World War II, the use of public warehouses by manufacturers doing interstate business has substantially increased.

At no time during the calendar years 1950 to 1954 did appellant have any common law employees of its own on duty in the public warehouses at Jacksonville, Camden, and Cleveland. At each warehouse it did, however, exercise virtually complete control over the activities of such warehouse in the receiving, storing, handling and shipping of appellant's products. That control was exercised through the acceptance and carrying out by each public warehouse of detailed instructions given it by appellant.

Section 210.3(a)(2)(B) of the Tax Law (Appendix D, p. 32) provides that where an order is received or accepted in New York, the sale of any tangible personal property not located at a permanent or continuous place of business maintained by the taxpayer outside the State of New York at the time of the receipt of or appropria-

tion to order must be deemed to be a sale made in the State of New York for purposes of the allocation formula in determining the corporate taxpayer's liability for franchise tax under Article 9-A. In computing appellant's franchise tax liabilities under Article 9-A for the calendar years 1950 to 1953, inclusive, appellee allocated to New York receipts from sales made of merchandise stored at the public warehouse in Jacksonville, Florida. Similarly, for the calendar year 1954, appellee allocated to New York receipts from sales made of merchandise stored in the public warehouses in Jacksonville, Florida, Camden, New Jersey, and Cleveland, Ohio. As a result thereof, appellee assessed and appellant paid additional Article 9-A franchise taxes of $34,323.52 for the calendar years 1950-1954 of which half was for the year 1954.

Appellant filed timely claims for refund of the said $34,323.52 of additional franchise taxes, which claims, after formal hearing, appellee, by its determination of December 31, 1958, rejected. Appellee's computation and determination were based squarely on its own interpretation, found in Article 413(2) of Regulations 9-A issued by it (Appendix E, p. 35) that a public warehouse could not be a permanent or continuous place of business of the taxpayer without the State of New York for purposes of Section 210.3(a)(2)(B) of the Tax Law. As stated above (*supra*, p. 3), it is precisely that interpretation which has been sustained by the courts below and which is the basis of the present appeal.

By its pleading and briefs, appellant presented to the courts below its claim that under appellee's determination of December 31, 1958 it was being denied equal protection of the laws and due process of law under Section 1 of the Fourteenth Amendment to the Constitution of the United States—whether or not appellee's interpretation of "permanent or continuous place of business maintained by the taxpayer without the state" (as found in Article 413(2), Regulations 9-A, issued by appellee) was proper under Sec-

tion 210.3(a)(2)(B), Article 9-A.* That claim was decided adversely to appellant after briefs and argument in both the Appellate Division and the Court of Appeals (Appendices A, B and C, pp. 23-30). See *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 655; *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182, 185-6; *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 98-9.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The decision of the Court of Appeals below authorizes the imposition of a tax burden which, as applied to appellant and other corporate taxpayers similarly situated, results in a denial of equal protection of the laws and due process of law guaranteed to appellant and such other taxpayers under the Fourteenth Amendment to the Constitution of the United States. The result of the decision of the Court of Appeals is squarely opposed to the decisions of this Court in *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U. S. 412; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Morey* v. *Doud*, 354 U. S. 457; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535; *Air-way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 85.

Although the taxable years here specifically involved are the calendar years 1950 to 1954, inclusive, the decision of the Court of Appeals, if not reversed, will permit the State of New York to collect substantial amounts of ad-

* It is significant to note the following: After the decision of the Appellate Division, appellant filed a motion in the Court of Appeals for leave to appeal from the order of the Appellate Division. That motion was denied, the Court of Appeals holding that appellant was entitled to an appeal as of right. In this case such appeal could lie *only* if "there be directly involved the construction of the constitution of the state or of the United States * * *" Section 588, subdivision 1(a), Civil Practice Act.

ditional corporate franchise tax from appellant for the calendar year 1955 and thereafter down to the present time. Concededly, equal protection of the laws and due process of law cannot be measured in dollars and cents, but the magnitude of additional taxes that would have to be paid, under what the appellant contends is an unconstitutional tax burden, is, of course, of relevance in determining the substantiality of the issues for appeal purposes.

The use of public warehouses is wide-spread throughout the United States. Insofar as appellant has been able to determine, the decision below is the only reported decision anywhere in the United States interpreting the concept of "permanent or continuous place of business maintained by the taxpayer" for purpose of corporate franchise tax on net income or net worth. In addition to New York, there are three other States, namely, New Jersey, Vermont, and Michigan, which have a statutory concept of "permanent or continuous place of business maintained by the taxpayer" for franchise tax purposes (see p. 11). Consequently, correct resolution of the constitutional issues in this case is of continuing importance and vitality not only to appellant and the State of New York, but also to the States of New Jersey, Vermont, and Michigan.

I

General aspects common to equal protection and due process issues.

1. Construction of statute by Court of Appeals is binding on this Court.

As previously indicated (*supra*, pp. 3, 7), the additional Article 9-A franchise taxes sought to be recovered by appellant were assessed and paid because appellee, in its Regulation 9-A, Article 413(2), had held that a public warehouse outside the State of New York cannot be a "per-

manent or continuous place of business maintained by the taxpayer without the state" of New York, as set forth in Section 210.3(a)(2)(B) of the Tax Law. In the Appellate Division and the Court of Appeals, appellant argued that appellee's interpretation of the above quoted statutory phrase was erroneous and contrary to the legislative history of the statute. The Appellate Division (Appendix C, pp. 27-30) concluded that "there is nothing arbitrary or unreasonable about regulations which classify, as here, what shall constitute a 'permanent or continuous place of business' * * * The courts should not interfere with details which administrative agencies employ in interpreting a broad statutory phrase unless the same are arbitrary and unreasonable." The Appellate Division thus upheld the appellee's interpretation, although it did not expressly state that the exclusion of a public warehouse from a "permanent or continuous place of business" was actually intended by the Legislature. Inasmuch as the Court of Appeals issued no opinion, one is left in the dark as to the precise reason or reasons for its decision, although, of course, it can be reasonably assumed that it approved the reasoning of the Appellate Division as to permissible interpretation of the statutory phrase "permanent or continuous place of business maintained by the taxpayer without the state."

For purposes of this appeal, the decision of the Court of Appeals on the question of statutory construction must be taken to mean that either the interpretation of the aforementioned statutory phrase contained in Article 413(2) of Regulations 9-A issued by appellee was an interpretation intended by the Legislature, or, if not actually intended by the Legislature, was permissible in the light of the words of the statute and the legislative history thereof. In any event, the construction placed by the Court of Appeals on the meaning, required or permissible, of Section 210.3(a)(2)(B) of the Tax Law is binding on this Court, *Kingsley International Pictures Corp.* v. *Regents of the*

University of the State of New York, 360 U. S. 684; *Lerner* v. *Casey*, 357 U. S. 468; *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, so that the constitutional issues raised by appellant in the courts below and on this appeal must be squarely resolved, uncomplicated by any non-federal question.

2. Similar statutes in other States

Three other States, namely, Vermont, Michigan and New Jersey have tax laws which involve the specific statutory concept of "permanent or continuous place of business" in the apportionment of income or net worth within or without the taxing State. To the extent here pertinent, the Vermont,[1] Michigan,[2] and New Jersey[3] statutes were enacted in 1947, 1952, and 1945, respectively, and thus subsequent to the 1944 enactment of Section 210.3(a)(2)(B) of Article 9-A. There appear to be no issued regulations under the Michigan statute. Regulations issued under the Vermont[4] and New Jersey[5] statutes merely adopt the regulations of appellee, including the definition of "permanent or continuous place of business" complained of and challenged by appellant.

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1 Sec. 5903, Ch. 153, Title 32, Vt. Stat. Ann. (1959).

2 Sec. 21.208, Mich. Stat. Ann. (L.1952, Act 183).

3 Sec. 54:10A-5, N. J. Stat. Ann. (L.1945, c. 162, sec. 6).

4 Art. 403-B; CCH State Tax Reporter (Vt.), Sec. 10-828A.

5 Reg. 16:10-4.230; CCH State Tax Reporter (N. J.), Sec. 5-819.

II

Appellant is denied equal protection of the laws.

1. The tax statute, as construed by appellee in its regulations, insofar as here pertinent, creates an unreasonable classification resulting in denial of equal protection of the laws.

For the taxable years here involved, the New York corporate franchise tax law contains a statutory formula for apportioning income in the case of a taxpayer carrying on an interstate and intrastate business. That formula, found in Section 210.3 of the Tax Law (Appendix D, pp. 31-32) is based on the so-called Massachusetts formula and involves the use of three factors, each of which is to be given equal weight, namely, tangible property, receipts, and compensation paid.

Under Section 210.3(a)(2)(B) receipts from sales of taxpayers' merchandise located at the time of the receipt of or appropriation to the orders at any "permanent or continuous place of business maintained by the taxpayer" outside the State of New York, are *not* allocated to New York *even though the orders for the purchase of such merchandise are accepted within the State of New York.* There is, however, no *statutory* definition of the phrase "permanent or continuous place of business maintained by the taxpayer". The only definition extant is that given by the appellee in Article 413(2) of Regulations 9-A (Appendix E, pp. 33-35) which unequivocally and without exception excludes a public warehouse from being a permanent or continuous place of business of the taxpayer. The additional tax paid by appellant, for which refund is sought, arises from the denial to appellant of the right to have the public warehouses in Jacksonville, Camden, and Cleveland treated as its permanent or continuous places of business for purposes of Section 210.3(a)(2)(B).

If the Court of Appeals below in effect has held that Section 210.3(a)(2)(B) of the Tax Law is to be read as if it *expressly* bars a public warehouse from being a permanent or continuous place of business maintained by the taxpayer (regardless of the permanency or continuity of the taxpayer's activities at such warehouse), then, as previously indicated, that interpretation is binding upon this Court.

With that assumption in mind, appellant contends as follows: A State is, of course, given wide latitude in classifying persons, occupations, transactions and forms of conduct or of ownership in the exercise of its taxing power. Nevertheless, the constitutional guarantee of the equal protection of the laws stands as a firm bulwark against unreasonable arbitrary classifications. Seventy-five years ago this Court stated that "equal protection of the laws is a pledge of the protection of equal laws", *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. That pledge, good today as in 1886, prevents all forms of invidious discrimination by a State. If a public warehouse cannot *in any case* be appellant's "permanent or continuous place of business", for the purpose of its Article 9-A franchise tax, despite the magnitude, permanence and continuity of appellant's activities at such warehouse, the State of New York is making an arbitrary, oppressive and invidiously discriminatory classification to appellant's detriment.* The State of New York cannot, of course, dictate to taxpayers how they shall operate their business outside New York. It should not be permitted to collect more tax from (a) appellant because the latter merely chooses to use an out-of-state public warehouse rather than own or lease property outside New York than from (b) a competitor of appellant who chooses to

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* Appellee's determination rests *exclusively* on Article 413(2), Regulations 9-A, a fact recognized by the Appellate Division in its opinion (Appendix C, pp. 27-30) and by the Court of Appeals in holding that appellant had an appeal as of right from the Appellate Division (see footnote, page 8, *supra*).

own or lease property outside New York—both businesses being of equal magnitude, permanence and continuity outside the State of New York. In fact, the business of appellant's competitor may even be less "permanent or continuous" than appellant's, yet appellant would be penalized by the higher tax.

The invidious discrimination of which the appellant is complaining is the classification made by the statute which puts taxpayers using a public warehouse outside the State of New York in a category separate and distinct from taxpayers who lease or own their own property outside the State of New York, although in every other respect the activities of both classes are similar and even identical. This Court is fully justified in taking judicial notice of the fact that the use of public warehouses is well established throughout the United States. Hence, there is no evil in such use which the Legislature of the State of New York is justified in discouraging or in penalizing. It is, therefore, no answer to appellant's contention of invidious discrimination that all users of public warehouses are treated the same under Section 210.3(a)(2)(B). The real inquiry is whether there is any justification for automatically treating them differently than other taxpayers, in all other basic respects the same, who do not use public warehouses but use their own premises with their own employees.

The decision of the Court of Appeals, sustaining the classification in effect made by Section 210.3(a)(2)(B) (as interpreted by appellee), is squarely contrary to numerous decisions of this Court. Thus, for example, this Court has invalidated attempted similar or analagous tax or license classifications in the following cases: *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U. S. 412; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Morey* v. *Doud*, 354 U. S. 457; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535; *Air-way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 85.

In *Royster Guano Co.* v. *Virginia, supra*, Virginia was not permitted to exempt its domestic corporations doing business exclusively outside the State from payment of income tax, while domestic corporations doing business within and without Virginia were required to pay a tax on all their income. (This decision was followed last year in every respect in *Cheney, Commissioner of Revenues* v. *Stephens, Inc.*, —— Ark. ——, 330 S. W. 2d 949.) In *Quaker City Cab Co.* v. *Pennsylvania, supra*, this Court struck down a Pennsylvania tax on gross receipts of corporations operating taxicabs where no similar tax was imposed on individuals and partnerships engaged in the same business. *Morey* v. *Doud, supra*, held invalid an Illinois statute requiring any firm selling or issuing money orders to secure a license and to submit to state regulations where, however, the American Express Company was exempted from such license and regulatory requirements. In *Louisville Gas & Electric Co.* v. *Coleman, supra*, a Kentucky statute was held invalid by this Court which purported to tax mortgages of over five years, but which exempted mortgages of five years or less. Ohio officials were, in *Wheeling Steel Corp* v. *Glander, supra*, not permitted to tax notes and accounts receivable of a foreign corporation for *ad valorem* tax purposes while exempting notes and accounts receivable of residents and domestic corporations. In *Concordia Fire Ins. Co.* v. *Illinois, supra*, this Court held invalid an Illinois statute which taxed foreign corporations writing fire, marine and inland navigation and casualty insurance on net receipts (including receipts from casualty business) but exempted foreign corporations writing only casualty insurance. Lastly, in *Air-Way Electric Appliance Corp.* v. *Day, supra*, this Court refused to sustain the imposition of a privilege tax on a foreign corporation doing both an intrastate and interstate business based on a proportion of authorized no-par stock when less than all of the authorized stock had been issued.

Inasmuch as these decisions have not been weakened in any way by later decisions of this Court, they are inconsistent in every respect with the result accomplished by the decision of the Court of Appeals below. In addition to the foregoing decisions of this Court, there are numerous other decisions of this Court (as well as State court decisions), holding various forms of State action invalid because violative of equal protection required under the Fourteenth Amendment. They are of great interest and relevance to the equal protection issue involved in this case. Some of those decisions are listed in Appendix F, p. 36, and if this appeal is allowed, their relevance will be discussed in detail in appellant's brief.

A decision by this Court that appellee's definition, which automatically bars a public warehouse from being a "permanent or continuous place of business maintained by the taxpayer", is constitutionally defective, would, of course, be consistent with this Court's established position that, accepting the definition as statutorily correct, this Court is, nevertheless, free to determine the effects and operation of such definition under the Fourteenth Amendment. *Gomillion v. Lightfoot,* 364 U. S. 339, 341-2; *Society for Savings in City of Cleveland, Ohio* v. *Bowers,* 349 U. S. 143, 151; *Dyer* v. *Sims,* 341 U. S. 22, 29; *Speiser* v. *Randall,* 357 U. S. 513; *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522, 525-6.

2. Appellee's determination denies appellant equal protection of the laws.

The discussion appearing on pp. 12-15 was based on the assumption that Section 210.3(a)(2)(B) of the Tax Law should be read as if it *expressly* bars a public warehouse from being a permanent or continuous place of business maintained by the taxpayer outside the State of New York. The discussion under this subdivision is based on the assumption that the definition contained in Article 413(2) of Regulations 9-A, barring a public warehouse from being

a permanent or continuous place of business maintained by the taxpayer outside the State of New York, is not necessarily required by, but is permissible under, the statute. In that posture it may be assumed it is appellee's action rather than the statute itself which is the basis for appellant's complaint. If that be so—and at this point there is no reason for appellant to dispute such an assumption—appellant's position here is basically the same as that heretofore set forth beginning on p. 12.

Under the Fourteenth Amendment, appellee is, of course, the State of New York. *Cooper* v. *Aaron*, 358 U. S. 1, 17; *United States* v. *Raines*, 326 U. S. 17. Consequently, if the action taken by appellee is in contravention of appellant's constitutional right to equal protection of the laws, this Court can strike it down without necessarily deciding that on its face Section 210.3(a)(2)(B) of the Tax Law is constitutionally defective.

The appellee's interpretation in fact makes what appears to be a valid statute operate unconstitutionally in the case of appellant and others similarly situated. A few examples will clearly expose the invidious arbitrariness of appellee's interpretation of "permanent or continuous place of business."

Corporation X leases (on a year to year basis) a store room in Camden, New Jersey, having 1,500 square feet of storage space, and employs two full-time employees. Appellee's interpretation is that receipts from sales at or from that store room are not allocated to New York, even though all the orders from such sales are approved in New York. If, however, because of bona fide reasons, Corporation X voluntarily chooses to utilize a public warehouse in Camden (on a year to year basis) where two full-time employees of the warehouse are engaged in handling X's merchandise occupying 2,500 square feet, receipts from the sales of such merchandise will be allocated to New York under the appellee's interpretation. Similarly, if Corporation X's own warehouse in Camden should be de-

stroyed by fire, and, pending restoration of such warehouse, X utilizes a public warehouse in Camden, receipts from the sales of its merchandise out of the public warehouse will be allocated to New York under appellee's interpretation. It is apparent that the New York Legislature was merely seeking to deny out-of-State allocation to casual, temporary places of business; accordingly, the challenged definition of "permanent or continuous place of business," as found in Article 413(2), is not only too restrictive but exceeds the latitude normally given a State in making classifications.

This Court has on occasion held administrative action that went beyond statutory requirements to be invalid under the Fourteenth Amendment without holding that the statute itself was invalid. See, for example, *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441; and *Speiser* v. *Randall*, 357 U. S. 513.

The dividing line between what a State may be permitted to do and what it is forbidden by the equal protection laws has "never been precisely fixed and is incapable of exact delimitation," *Colgate* v. *Harvey*, 296 U. S. 404, 422. Accordingly, no definition or classification is free of imprecision. Nevertheless, imprecision which puts a tax burden on appellant because of an arbitrary and unreasonable classification, having no fair relationship to or connection with a permissible legislative objective, is constitutionally proscribed.

That proscription is no less real even though the Appellate Division (Appendix C, p. 30), and, presumably, also the Court of Appeals were of the view that because appellant knew of the appellee's definition before it entered into arrangements with public warehouses, it could not complain of such definition. If such definition is constitutionally defective, appellant is certainly not estopped from challenging it and does not have to tailor its business operations to invalid requirements in order to avoid legally the payment of additional franchise tax.

III

Appellant is denied due process of law.

1. The tax statute, as construed by appellee in its regulations, insofar as here pertinent, is so unreasonable as to result in a denial of due process of law.

In addition to the arguments heretofore made under the equal protection of laws issue, appellant contends that it is being denied due process of law. If Section 210.3(a)(2)(B) requires that sales of appellant's products, stored at the public warehouses in Camden, Cleveland and Jacksonville and appropriated to specific customers only at those warehouses and at no other place, must be allocated to New York, such statutory requirement is invalid and illegal as depriving appellant, a New Jersey corporation, of its property without due process of law.

The core of appellant's contention here is simply that, under the circumstances of this case, it is so unreasonable for the State of New York to impose its franchise tax based on appellant's sales out of and from a public warehouse outside New York as to constitute a violation of the due process clause of the Federal Constitution. The concepts of equal protection of the laws and due process of law are in reality two aspects of the ideal of fairness in American government. "'The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always interchangeable. But, as this Court has recognized, discrimination may be so unjustified, as to be violative of due process." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. That observation is clearly and fully applicable in this proceeding because the assumed statutory discrimination against the use of public warehouses, for Article 9-A franchise tax purposes, is so unreasonable

and unjustified as to be violative of due process of law. It is one thing for a statute to place use of a public warehouse on an equal footing with use of other premises but quite another to make use of a public warehouse automatically more costly taxwise without any basis in logic or public need. In the latter situation there would be justifiable complaint that the limit of state power has been reached or crossed.

Under the teaching of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, an allocation formula, ostensibly fair on its face, may in fact result in an arbitrary and unreasonable application which must be stricken down as being in violation of due process. In that case, this Court held invalid a statutory formula under a North Carolina corporate income tax which allocated to North Carolina the income of a New York corporation out of proportion to the business transacted by the corporation in North Carolina. This Court specifically pointed out that where a corporation manufactures in one State and sells in another, neither all nor a disproportionate part of the net profits may be automatically attributed to the State where the manufacture occurs.

If a foreign corporation (such as appellant) were to have its only manufacturing plant in New York (as did appellant during the years 1950 to 1954) and were to make all of its sales to customers throughout the United States out of its manufactured products stored at public warehouses outside New York, it certainly would be unreasonable, under the rationale of the *Hans Rees' Sons* decision, for New York to allocate all the sales to New York. Yet that result would apparently be required under Section 210.3(a)(2)(B) as interpreted, assuming, of course, that appellee's interpretation correctly reflects the statutory requirement. Under a logical extension of that result, it appears to be unreasonable and arbitrary to allocate to New York income from sales made of property stored at public warehouses outside the State of New York even though such sales were only a portion of the taxpayer's

total sales. None of the sales made during the calendar years 1950 to 1954 out of merchandise stored at the Jacksonville, Camden, and Cleveland warehouses were made to customers in the State of New York. Consequently, appellant contends, it is a violation of due process of law to require it to pay New York corporate franchise tax based on those sales merely because they were made out of merchandise stored in public warehouses rather than from merchandise stored on premises that might have been owned or rented by appellant in Jacksonville, Camden, and Cleveland and manned by its own employees.

2. Appellee's determination denies appellant due process of law.

Here, as in the discussion appearing on pp. 16-18, the assumption is that the definition contained in Article 413(2) of Regulations 9-A, automatically barring a public warehouse from being a permanent or continuous place of business maintained by the taxpayer outside the State of New York, is not necessarily required by, but is permissible under, the statute. What has been said there, to the extent here pertinent, will not be repeated here.

The burden of prescribing a constitutionally valid definition of "permanent or continuous place of business maintained by the taxpayer" outside the State of New York, is, of course, not the appellant's. The responsibility for prescribing such valid definition and of administering the statute in a constitutionally valid manner falls squarely upon appellee as an official governmental arm of the State of New York. For present purposes, appellant's own task is merely to show that the definition which was applied to it by appellee and the resulting determination of appellee are shot through with sufficient doubts as to their constitutional validity under either or both the equal protection and due process provisions of the Constitution so as to justify this Court in taking jurisdiction of this appeal. This task, appellant respectfully contends, it has fulfilled.

Conclusion

The decision below is erroneous. The constitutional questions presented by this appeal are substantial and of public importance. This case is one of first impression. Appellant, therefore, respectfully submits that the Court should take jurisdiction of this appeal.

Respectfully submitted,

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Austin & Diamond
Of Counsel

APPENDIX A

Memorandum of Decision of the Court of Appeals

Appeal on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 8, 1960, in a proceeding under section 215 of the Tax Law and article 78 of the Civil Practice Act (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County) which unanimously confirmed a determination of respondent State Tax Commission rejecting an application for revision of franchise taxes assessed against petitioner-appellant for the years 1950 through 1954. Petitioner, a manufacturer of chewing gum and related products marketed to jobbers and distributors throughout the United States, had its main office and plant in New York City, and storage and distribution arrangements with public warehouses in Jacksonville, Florida, since 1948, and in Camden, New Jersey, and Cleveland, Ohio, since 1954. The facilities were operated by employees of the warehouses but they worked exclusively on petitioner's orders. All orders for shipments, except those from some customers whose credit was unquestioned, were received and accepted in petitioner's New York office. Article 9-A of the Tax Law (§210, subd. 1) imposed a franchise tax on the net income of a corporation "or the portion thereof allocated within the state". Subdivision 3 of section 210 of the Tax Law provided that "The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows: (a) multiply its business income by a business allocation percentage to be determined by * * * (2) ascertaining the percentage which the receipts of the taxpayer * * * arising * * * from (A) sales of its tangible personal property located within the state at the time of the receipt of or appropriation to the orders, (B) sales of any such property not located at the

time of the receipt of or appropriation to the orders at any permanent or continuous place of business maintained by the taxpayer without the state, where the orders were received or accepted within the state" and other stated items bear to the entire income. Under Regulations 9-A of the State Tax Commission, subdivision b of article 413(2) provided that "A permanent or continuous place of business maintained by the taxpayer outside New York is any bona fide * * * warehouse, or other space outside New York, at which the taxpayer is doing business in its own name in a regular and systematic manner, and which is continuously maintained, occupied and used by the taxpayer in carrying on its business through its regular employees regularly in attendance." (N. Y. Off. Comp. of Codes, Rules & Regulations [5th Supp.], p. 756.) Respondent allocated receipts from distributions made from the Florida, Ohio and New Jersey warehouses to New York on the ground that the three warehouses were not "permanent or continuous place[s] of business". In the Court of Appeals petitioner argued that it had a "permanent or continuous place of business" in Jacksonville, Camden and Cleveland and that the interpretation by respondent and the Appellate Division of the phrase "permanent or continuous place of business" denied petitioner equal protection of the laws and due process of law.

Order affirmed, with costs; no opinion.

Concur: Chief Judge DESMOND and Judges DYE, FROESSEL, BURKE and FOSTER. Judges FULD and VAN VOORHIS dissent and vote to reverse the order of the Appellate Division and to direct the State Tax Commission to refund the asserted overpayments of franchise tax.

APPENDIX B

Judgment and Remittitur of the Court of Appeals

BE IT REMEMBERED, that on the 5th day of December in the year of our Lord one thousand nine hundred and sixty, American Chicle Company, the appellant in this cause, came here unto the Court of Appeals, by Austin & Diamond, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The State Tax Commission of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Leo A. Diamond, of counsel for the appellant, and by Mr. Robert W. Bush, of Counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Appellant contended that the construction by the New York State Tax Commission of section 210 of the Tax Law denied it the equal protection of the laws and due process of law as guaranteed by the Fourteenth Amendment. The Court of Appeals held that there was no such violation, and that there was no substance or merit to appellant's contentions.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of
the State of New York

Court of Appeals, Clerk's Office,
Albany, April 27, 1961

APPENDIX C

Opinion of the Appellate Division

In the Matter of the Application

of

AMERICAN CHICLE COMPANY,

Petitioner,

for a review and an order pursuant to Article 78 of the Civil Practice Act,

against

THE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

REYNOLDS, J.:

This proceeding instituted under Tax Law, section 215 and Article 78 of the Civil Practice Act, seeks review of a final determination of the State Tax Commission, which rejected the application of the petitioner, American Chicle Co., for refund of corporate franchise taxes imposed under Section 210 of Article 9-A of the Tax Law for the years 1950 through 1954.

The American Chicle Company is a New Jersey Corporation, but has its principal office and its manufacturing plant at Long Island City, N. Y., with only a statutory office in New Jersey. Since 1948, it has had a storage and distribution arrangement with a public warehouse in Florida and since 1954, similar arrangements in New Jersey and Ohio. Although petitioner did not produce the

contracts controlling these arrangements, it appears that petitioner paid the warehouse for storage and handling, which included fulfilling orders transmitted to the warehouse and delivering them to carriers designated by petitioner. The persons handling the products at these locations were employees of the warehouses, although some of them worked full time on petitioner's business requirements. The warehouses were occasionally visited by some of petitioner's regular sales force, but generally no orders were filled by the warehouses without prior approval of the New York office, except for certain large volume customers who had advance clearance from petitioner. All instructions for handling, storing, and shipping issue from New York.

The formula for computing franchise taxes on business corporations deriving revenue without the state consists generally of comparing receipts from business transacted within the state to total receipts (Tax Law, section 210, subd. 3 (a)). This proceeding is concerned only with a provision excluding from the equation, receipts arising from the sale of tangible personal property located at a permanent or continuous place of business outside the state. The language of the statute is comprehensively inclusive and sweeps into the equation the sales of any tangible personal property wherever located "where the orders were received or accepted within the state", except of any such property "located at the time of the receipt of or appropriation to the orders at any permanent or continuous place of business maintained by the taxpayer without the state" (subd. 3 (a) (2) (B)).

Primarily, the issue here is the correct interpretation of the language used in subdivision 3 (a) (2) (B). For an attempt at clarity, the significant language may be excerpted as follows:

"the percentage which the receipts * * * arising * * * from

"(A) sales of its tangible personal property located within the state * * * (and from the)

"(B) sales of any such property not located at the time of the receipt of or appropriation to the orders at any permanent or continuous place of business maintained by the taxpayer without the state, where the orders were received or accepted within the state * * *

"(E) * * * bear to the total amount of the taxpayer's receipts * * *.)"

Petitioner's position is that the language used in Tax Law section 210 subd. 3 (a) (2) (B) means that receipts from orders accepted in New York are excluded, if at the time of the order the merchandise used to fill the order is located at a permanent or continuous place of business outside of the state. It contends that the public warehouse facilities satisfy the requirements of a permanent or continuous place of business. The commission, as evidenced by its regulations, has interpreted the statute to require not only that the merchandise be located at a place of business ouside of the state but also that the place be staffed by regular employes of the taxpayer. Public warehouses are specifically excluded.

The issue then is limited to the meaning of the phrase "permanent or continuous place of business maintained by the taxpayer without the state". Article 413 (2) of the regulations defines it as follows:

"A permanent or continuous place of business maintained by the taxpayer outside New York is a bona fide office (other than a statutory office), factory, warehouse, or other space outside New York, at which

> the taxpayer is doing business in its own name in a regular and systematic manner, and which is continuously maintained, occupied and used by the taxpayer in carrying on its business through its regular employees regularly in attendance."

To dispel any doubts concerning the term "warehouse", the regulation also provides, "property stored in a public warehouse * * * (is) not located at a permanent or continuous place of business maintained by the taxpayer." Example 6 of the regulation illustrates the Commission's interpretation:

> "Example 6: A taxpayer accepts an order through a salesman or officer working out of its New York office in another state, and fills such order from a stock of goods *kept in a public warehouse outside New York.* The receipt from the sales is allocable to New York." (Emphasis supplied)

In our view there is nothing arbitrary or unreasonable about regulations which classify, as here, what shall constitute a "permanent or continuous place of business". Petitioner has places of business, which are continuously maintained and used by this taxpayer in carrying on its business through regular employees in attendance, and sales therefrom are excluded from the equation. It knows that under the regulations sales from a public warehouse are not excluded. The courts should not interfere with details which administrative agencies employ in interpreting a broad statutory phrase unless the same are arbitrary and unreasonable.

We find no violations here of the Due Process and Equal Protection clauses of the State or Federal Constitutions.

The determination should be confirmed with fifty dollars costs.

APPENDIX D

Applicable Statute

Article 9-A, Tax Law*

Franchise Tax on Business Corporations

Sec. 210. Computation of tax.

1. The tax imposed by subdivision one of section two hundred nine of this chapter shall be, in the case of each taxpayer: (a) a tax (1) computed at the rate of four and one-half per centum on its entire net income, or the portion thereof allocated within the state as hereinafter provided * * *.

* * *

3. The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

(1) [ascertaining ratio of New York tangible property to total tangible property];

(2) ascertaining the percentage which the receipts of the taxpayer * * * arising * * * from

(A) sales of its tangible personal property located within the state at the time of the receipt of or appropriation to the orders,

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* Enacted by Ch. 415, Laws 1944 and insofar as here pertinent effective for taxable years beginning before January 1, 1961. For taxable years beginning on or after January 1, 1961, Section 210 has been amended by Ch. 713, Laws 1961 in various respects not here material.

(B) sales of any such property *not located at the time of the receipt of or appropriation to the orders at any permanent or continuous place of business maintained by the taxpayer without the state,* where the orders were received or accepted within the state • • • (italics supplied)

(C) [New York services],

(D) [New York rents and royalties], and

(E) [Miscellaneous New York income, bear to entire business income];

(3) [ascertaining ratio of New York compensation as defined, to total compensation]; and

(4) adding together the percentages so determined and dividing the result by the number of percentages; provided, however, that if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred per cent.

APPENDIX E

Applicable Regulations

Regulations 9-A (1956)*

Franchise Tax on Business Corporations

Art. 411. *Computation of Business Allocation Percentage*

• • •

A regular place of business is any *bona fide* office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. Where as a regular course of business, property of the taxpayer is stored by it in a public warehouse until it is shipped to customers, such warehouse is considered a regular place of business of the taxpayer and, where as a regular course of business, raw material or partially finished goods of a taxpayer are delivered to an independent contractor to be converted, processed, finished or improved, and the finished goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business of the taxpayer. (Compare, *permanent or continuous place of business*, Art. 413(2)).

A taxpayer does not have a regular place of business outside the state solely by consigning goods to an independent factor outside the state for sale at the consignee's discretion.

If the taxpayer had a regular place of business outside New York during the period covered by the report, its business allocation percentage is generally computed on the basis of its

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* Insofar as here pertinent, Regulations 9-A (1956 edition) is the same as the earlier edition applicable to the privilege years 1950-1954.

Appendix E

(1) real and tangible personal property (including real property rented to it) within and without New York (Art. 412, 412(1)),

(2) business receipts within and without New York (Art. 413), and

(3) payrolls within and without New York (Art. 414). * * *

Art. 413(2). *Sales of Tangible Personal Property Not Located at a Permanent Place of Business Outside New York.* Receipts from sales of the taxpayer's tangible personal property (such as goods, wares, merchandise, etc.) are allocable to New York if such property is not located, at the time of the receipt of or appropriation to the orders (Art. 413(1)), at any permanent or continuous place of business maintained by the taxpayer outside New York, provided the orders are either received or accepted in New York. Under this provision, if the property sold was not in existence or was located outside New York at the time the order was received, and was located outside New York at the time it was appropriated to the order, the receipt from the sale is nevertheless allocable to New York, unless it can be shown also (1) that at one of those times the property was located at a permanent or continuous place of business maintained by the taxpayer outside New York, or (2) that the order was both received and accepted outside New York * * *.

A permanent or continuous place of business maintained by the taxpayer outside New York is any *bona fide* office (other than a statutory office), factory, warehouse, or other space outside New York, at which the taxpayer is doing business in its own name in a regular and systematic manner, and which is continuously maintained, occupied and

used by the taxpayer in carrying on its business through its regular employees regularly in attendance.

Tangible personal property * * * stored in a public warehouse * * * [is] not located at a permanent or continuous place of business maintained by the taxpayer. (Compare regular place of business, Art. 411). * * *

Example 6: A taxpayer accepts an order through a salesman or officer working out of its New York office in another state, and fills such order from a stock of goods kept in a public warehouse outside New York. The receipt from the sales is allocable to New York.

APPENDIX F

Selected Decisions on Violation of Equal Protection and Due Process

1. **U. S. Supreme Court**

Cotting v. *Godard*, 183 U. S. 79

Southern R. Co. v. *Greene*, 216 U. S. 400

Smith v. *Cahoon*, 283 U. S. 553

Liggett v. *Lee*, 288 U. S. 517

Stewart Dry Goods Co. v. *Lewis*, 294 U. S. 550

Skinner v. *Oklahoma*, 316 U. S. 535

2. **Other Courts**

People ex. rel. Farrington v. *Mensching*, 187 N. Y. 8

In re New York City, 190 N. Y. 350

People ex. rel. Moskowitz v. *Jenkins*, 202 N. Y. 53

Merchant's Refrigerating Co. v. *Taylor*, 275 N. Y. 113

Re Irish, 122 Kan. 33

City of Atchison v. *Beckenstein*, 143 Kan. 440

State of Kansas ex. rel. Marshall v. *Consumers Warehouse Market, Inc.*, 185 Kan. 363

People ex. rel. Schoon v. *Carpentier*, 2 Ill. 2d 468

De Monaco v. *Renton*, 18 N. J. 352

State v. *A. J. Bayless Markets, Inc.*, 86 Ariz. 193

Police Commissioner of Baltimore City v. *Siegel Enterprises*, 223 Md. 110

Steffey v. *City of Casper*, —— Wyo. —— 357 P. 2d 456

People v. *Albrecht*, —— Colo. ——, 358 P. 2d 4

Southwestern Bell Telephone Co. v. *Morris*, —— Mo. ——, 345 S. W. 2d 62

Petitt v. *Field*, —— Mo. ——, 341 S. W. 2d 106

Palmer Park Theater Co. v. *City of Highland Park*, 362 Mich. 326

Wittkampner v. *Harvey*, 182 F. Supp. 715

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(922)

Supreme Court of the United States

No. 301—October Term, 1961

AMERICAN CHICLE COMPANY,

Appellant,

against

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION

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Supreme Court of the United States

No. 301—October Term, 1961

AMERICAN CHICLE COMPANY,

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against

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF MOTION

Comes now the appellee above named and moves under Rule 16(1)(b) of the Rules of this Court to dismiss the appeal taken to this Court by Notice of Appeal dated July 10, 1961 from the final order (erroneously referred to as a judgment) of the Court of Appeals of the State of New York on the ground that it does not present substantial Federal questions or, in the alternative, to affirm the final order so appealed from.

The Nature of the Proceeding and Determinations Made Below

This proceeding was instituted in the Supreme Court of the State of New York, Albany County, under Article 78 of the New York Civil Practice Act, to review a final determination of the State Tax Commission, which had sustained assessments of corporate franchise taxes imposed by Article 9-A of the New York Tax Law for the privilege

years 1950-1954, inclusive. The proceeding was transferred to the Appellate Division, Third Judicial Department, of the Supreme Court, for initial disposition pursuant to Section 1296 of the Civil Practice Act, where such determination was unanimously confirmed with an opinion reported in 11 A. D. 2d 256 (Appen. C of Applt's Juris. Stmt.). Among other things, this opinion stated:

> "We find no violations here of the Due Process and Equal Protection clauses of the State or Federal Constitutions."

On appeal to the Court of Appeals of the State of New York, the order of the Appellate Division was affirmed without opinion, with two Judges dissenting. 9 N. Y. 2d 883. Upon appellant's motion to amend the remittitur, that Court's remittitur was amended to recite (9 N. Y. 2d 965):

> "* * * Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.:* Appellant contended that the construction by the New York State Tax Commission of section 210 of the Tax Law denied it the equal protection of the laws and due process of law as guaranteed by the Fourteenth Amendment. The Court of Appeals held that there was no such violation, and that there was no substance or merit to appellant's contentions."

Statement of the Case

While the facts are undisputed, it is nevertheless necessary to make a factual recitation thereof by reason of misleading factual and legal inferences drawn from appellant's incomplete Statement of Facts.

The American Chicle Company, incorporated under the Laws of New Jersey in 1899, has been doing business in the State of New York since that date and maintains its manu-

facturing plant and its principal office in Long Island City, New York, with only a statutory office in New Jersey (R. pp. 17, 191). It is engaged in the manufacture and sale of chewing gum and similar confectionery products (R. p. 51).

During the privilege years in question, 1950-1954, inclusive, the American Chicle Company had entered into storage and distribution "rental arrangements" with independently owned and operated public warehouses located at Jacksonville, Fla., Camden, N. J., and Cleveland, Ohio, whereby its products were temporarily stored pending ultimate distribution to various customers (R. pp. 45-46). While these contracts were not introduced in evidence, it appears from the record that the amount of products and storage space varied with each of these public warehouses, depending upon factors of supply and demand for appellant's products (R. pp. 52-54). Under the respective storage arrangements, the American Chicle Company paid each public warehouse a rental charge based upon the volume of cartons stored and handled (R. pp. 48, 67) and a certain amount per order for the necessary clerical work involved and for repackaging where necessary (R. pp. 48-49). Warehouse rental charges were increased from time to time by reason of increased operating costs incurred by the warehouse, mostly labor costs (R. pp. 49-50).

In some instances deliveries of appellant's products were made directly from these public warehouses to certain "clear credit accounts" which pertained solely to large chain stores. But this was done only after their credit had been previously approved at the home office in New York and then only where the "orders still clear through the New York office" (R. pp. 54, 71-73). All other orders for the sale of appellant's products were accepted and

received at its principal office in New York before any distribution was made from any of the three public warehouses (R. pp. 66-67). After receipt and acceptance of a sales order by the home office, the respective public warehouse involved was notified by the appellant as to that order, and shipping instructions issued as to assembling and labeling the goods for delivery to the customer. The warehouse then prepared bills af lading and requested the proper carrier to pick up for delivery (R. p. 52). Some jobbers might go directly to the warehouse for pickup as the result of an undisclosed arrangement with appellant's home office (R. pp. 66-67). Appellant furnished the warehouse with blank forms to use—certain bills of lading forms, inventory forms and copies of invoices (R. p. 54).

Each public warehouse is maintained and operated as a separate and independent legal and economic entity furnishing storage facilities to all who wish to utilize them. Each assigns and pays its *own employees* to handle appellant's merchandise (R. pp. 51, 65-66, 87), and appellant has no actual control over their working activities (R. pp. 65-66; *cf.* p. 80). Despite the bald assertion that appellant's control was exercised, the record discloses that this was nothing more than the usual "separate sheet of instructions for each warehouse" for storage purposes and for the handling of orders at the warehouse (R. pp. 53-54, 81). This seems to deal with sealing and packaging of cartons (R. p. 82), and the freight routes to be used (R. pp. 53, 81, 83, 84). Presumably, this was in accordance with the warehouse storage contracts since representatives from appellant's home office occasionally visited the warehouses to see if this was carried out (R. pp. 82, 87). If any doubt or confusion arose, it would be resolved at appellant's home office by telephone (R. p. 83). Occasional visits also

were made by appellant's sales managers two or three times a year but this seems to be only as the result of customers' complaints (R. pp. 57, 67, 71).

While appellant asserted that it preferred to enter into storage contracts with these three public warehouses in Florida, New Jersey and Ohio, being influenced by cost and transportation factors (R. pp. 58, 60-62, 70, 85), nevertheless, it does own and operate its own warehouses in other States which are maintained by its own employees (R. pp. 64-65). As to distribution from its own warehouses, the record shows that all sales orders are received and accepted at offices maintained by the appellant *outside* New York State—not at its principal office in New York. All such receipts from sales out of its own warehouses, of course, are allocated outside this State and are excluded from the statutory sales receipts factor of the formula (N. Y. Tax Law § 210[3][a][2][B]. These allocations are reflected in the business income allocation percentages used in apportioning appellant's business income within and out the State of New York which is fully set forth in appellee's final determination (R. pp. 5-8). No question is raised (R. pp. 17-24) as to either the adequacy or accuracy of the factual findings or mathematical computations set forth in such determination (R. pp. 4-14).

Questions the Appeal Would Present

Whether a foreign corporation, having only a statutory office in New Jersey, engaged in a manufacturing business in New York State with its principal place of business located in New York, is deprived of equal protection of the laws and of due process of law under the Fourteenth Amendment to the Constitution of the United States where New York denies an out-of-state allocation of receipts from

sales of goods from out-of-state independent public warehouses upon orders received and accepted in New York under a corporate franchise tax formula, designed to allocate to New York a fair share of net income, where by reason of the sales receipts factor of such formula, the State construes sales from such public warehouses as not having been made from a statutory "permanent or continuous place of business maintained by the taxpayer without the state * * *".

No questions concerning any burden upon interstate commerce are before the Court, in view of the limited scope of the federal questions in the remittitur (9 N. Y. 2d 965). None was raised in appellant's petition for judicial review (R. pp. 17-24).

There is no constitutional violation where receipts from sales from orders received and accepted at the principal office in New York are allocated to that State.

We submit that both Courts below correctly found appellant's constitutional contentions were devoid of merit. Appellant has not sustained its burden of overcoming these tax assessments upon any constitutional ground (see *e. g., Norton Co.* v. *Department of Revenue of Illinois,* 340 U. S. 537). There has been no showing that any "extra territorial values have been taxed" (see *e. g., Butler Brothers* v. *McGolgan,* 315 U. S. 501, 507; *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183) nor, despite the intimation to the contrary, "There is nothing to show that multiple taxation is present. We cannot deal in abstractions." (*Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 463.) There is nothing in this Record showing, in the face of such a broad intimation, either the precise nature of the kinds of taxes paid by appellant in the states where distribution

was made from public warehouses, or even whether the sales, approved in New York for such distribution, had any connection whatever and/or to what extent were they factors at all considered by foreign taxation, in any event. Consequently, all such inferences are purely speculative and have no relevancy to appellant's contentions asserted here (*Northwestern States Portland Cement Co.* v. *Minnesota, supra*).

The crux of this proceeding centers upon questions of statutory construction of broad statutory terms (N. Y. Tax Law § 210) implemented by appropriate administrative franchise tax regulations (Arts. 411, 412, 413), and the application of both to appellant's various business transactions, within and without New York State. Appellant's position stems from a misunderstanding of the taxing concepts involved in New York's franchise tax formula—one which contains three factors, property, sales receipts and payrolls and the percentage weight given to each, designed to allocate to New York a fair share of corporate net income from business conducted in New York by a foreign domesticated corporation. Such misunderstanding, we submit, gives rise to appellant's erroneous construction of the statute and regulations and by its failure to give due weight to each term thereof. This is emphasized by its argument as though nothing at all significant occurred at its main office in New York for the approval and acceptance there of all sales of its products ultimately distributed from out-of-state, independent, public warehouses owned and operated by others as separate legal and economic entities. Under this Court's decisions, of course, receipt and acceptance of such sales orders are *taxable* events, constituting a sufficient nexus upon which to apportion sales income to the taxing state in the percentage computations under the

formula. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450; *Scripto, Inc.* v. *Carson*, 362 U. S. 207; *Butler Bros.* v. *McGolgan*, 315 U. S. 501.

In full recognition of such taxable nexus, and of business done in New York, the sales receipts factor of the formula provides (Tax Law § 210[3][a][B]):

> "(B) sales of any such property not located at the time of the receipt of or appropriation to the orders at any *permanent or continuous* place of business *maintained* by the taxpayer without the state, where the orders were received or accepted within the state and for purposes of this clause an order shall be deemed received or accepted within the state if it has been received or accepted by an employee, agent, agency or independent contractor chiefly situated at, connected with, by contract or otherwise, or sent out from a permanent or continuous place of business of the taxpayer within the state." (Emphasis added.)

This has been a part of the statute since L. 1944, ch. 415, as amended by L. 1948, ch. 603, and is in substitution of the former "accounts receivable" factor, the constitutionality of which had been sustained long ago in *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271. The substitution was made to more equitably allocate income (Pub. Papers of Gov. Dewey [1943], p. 500), and expresses the "origin of sales" concept rather than "sales destination" erroneously asserted by appellant.

The decisive phraseology is italicized above which, as broad statutory terms, were appropriately defined by administrative regulations as excluding independent public warehouses from their scope for the very logical reason that such places of business, for sales receipts purposes, were not those of the taxpayer; otherwise, there would be no need, as here, to transmit to its home office for approval sales orders which the statute is designed to reach.

Thus, the regulations, giving full meaning to each statutory term, provide (Art. 413[2]):

> "Art. 413 (2). Sales of Tangible Personal Property Not Located at a Permanent Place of Business Outside New York. Receipts from sales of the taxpayer's tangible personal property (such as goods, wares, merchandise, etc.) are allocable to New York if such property is not located, at the time of the receipt of or appropriation to the orders (Art. 413 [1]), at any permanent or continuous place of business maintained by the taxpayer outside New York, provided the orders are either received or accepted in New York. Under this provision, if the property sold was not in existence or was located outside New York at the time the order was received, and was located outside New York at the time it was appropriated to the order, the receipt from the sale is nevertheless allocable to New York, unless it can be shown also (1) that at one of those times the property was located at a permanent or continuous place of business maintained by the taxpayer outside New York, or (2) that the order was both received and accepted outside New York. (As to property located in New York at the time of receipt of or appropriation to the order, see Art. 413 [1]). An order is deemed received or accepted in New York if received or accepted by an employee, agent, agency or independent contractor chiefly situated at, connected with, by contract or otherwise, or sent out from a permanent or continuous place of business of the taxpayer within New York.
>
> A permanent or continuous place of business maintained by the taxpayer outside New York in any *bona fide* office (other than a statutory office), factory, warehouse, or other space outside New York, at which the taxpayer is doing business in its own name in regular and systematic manner, and which is continuously maintained, occupied and used by the taxpayer in carrying on its business through its regular employees regularly in attendance.
>
> Tangible personal property purchased by the taxpayer and held by the seller for delivery as directed by the taxpayer, property in transit, property stored

in a public warehouse, property in the possession of an independent contractor, and property in the possession of an independent factor for sale at his own discretion are not located at a permanent or continuous place of business maintained by the taxpayer. (Compare, regular place of business, Art. 411.)"

All of Article 413 emphasizes the statutory intent to exclude public warehouses from statutory places of business "permanently or continuously maintained" outside New York so as to afford an allocation under the sales receipts factor where orders are received and accepted in New York. Thus, in addition to what is strictly its text, illustrative examples are appended to the regulations (Art. 413[2]):

"*Example 3:* A taxpayer receives or accepts in New York an order which it fills from a stock of goods in a warehouse regularly maintained by it through its own employees in Michigan. The receipt from the sale is not allocable to New York.

Example 4: A taxpayer receives or accepts in New York an order for a machine. If, after receipt of the order, the taxpayer purchases the machine and has it shipped direct to its customer by the seller, the receipt from the sale is allocable to New York; but if the taxpayer manufactures the machine in its factory outside New York, from which it is shipped to the customer, the receipt from the sale is not allocable to New York.

Example 5: A taxpayer receives or accepts in New York an order of a customer under which goods can be withdrawn, from time to time, from a stock of goods kept by the taxpayer in a public warehouse outside New York. When goods are withdrawn to fill the order, the taxpayer is notified and it bills the customer. The receipt from the sale is allocable to New York.

Example 6: A taxpayer accepts an order through a salesman or officer working out of its New York office in another state, and fills such order from a stock of goods kept in a public warehouse outside New York. The receipt from the sales is allocable to New York.

Example 7: A taxpayer receives or accepts in New York an order for shirts which it fills from stock stored at the Pennsylvania plant of the independent contractor, who manufactured the shirts for it and who ships the shirts to the customer. The receipt from the sale is allocable to New York.

Example 8: A taxpayer receives or accepts in New York an order for shirts which it fills from stock stored at the Pennsylvania plant of the independent contractor who manufactured the shirts for it. The taxpayer has an arrangement with the contractor under which space at the contractor's plant is leased to the taxpayer for the storage of the shirts manufactured for it and facilities are made available for the shipment of the shirts to the customer from the plant of such contractor by a shipping clerk employed by the taxpayer. The receipt from the sale is allocable to New York."

We submit that this administrative interpretation gives rise to no questions of constitutionality here on any score.

The fallacy of appellant's position is that it fails to distinguish between the two kinds of warehouse distributions, public and private, which it utilizes in different states. Each presents valid taxable distinctions which, by its own business decisions, appellant otherwise recognizes by its election, as the record clearly shows (R. pp. 65, 69), to distribute its products from its *own* warehouses regularly and systematically maintained and operated, permanently and continuously, in its own name, in other states where orders are received and accepted in those states. Allocation is given, of course, to such sales.

The two methods of distribution cannot be equated, however, because they do not stand upon the same tax footing. Taxwise, rational distinctions do exist between mere distributions from independent public warehouses, where all sales are approved in New York, with right of rejection,

too, on the one hand, and distributions from its own warehouses which it permanently and continuously maintains, on the other hand. The former cannot be considered either appellant's sales offices or places of business for sales receipts. Actually this record throws little light on just what sales activities are involved in those states, in any event. They certainly are not the same as in those states where it maintains its own warehouses. Furthermore, there has been no showing whatever that appellant has gone into those "public warehouse" states to do its own localized business, as distinguished from the independent business of the public warehouses which are legal and economic entities of their own doing their own business, as it has become localized in those states where it does maintain its own branch offices and its own business warehouses (see *Norton Co.* v. *Department of Revenue*, 340 U. S. 537). For ought we know from this record, appellant's resort to public warehouse activities may be precisely to avoid subjecting itself to localized jurisdiction in such states with all the myriad legal consequences flowing therefrom and in order to retain all the benefits otherwise accorded by its domestication in New York—consequences affecting its corporate jurisdictional status, business, employees, and liability, to mention only a few resulting from doing its own business in its own name with its own employees. Certainly, appellant's relationship to the states where those public warehouses are located is not direct nor the same as it is to New York or to those other states where it does do its own business in its own warehouses. That kind of relationship involves, of course, opportunities which those states give, protection afforded and benefits conferred requiring the right of taxation in return (see *Wisconsin* v. *Penny Co.*, 311 U. S. 435, 444).

Appellant has not shown what factors or reasons why an allocation should be obtained and has not overcome the basic reason for granting a sales allocation outside New York, in the first place, *viz.*, doing its own business elsewhere.

For these reasons there is no merit to appellant's attempted comparison of its taxable position with that of its competitors, speculative in any event, who maintain their own warehouses outside the State and who receive from New York a sales receipts allocation for doing their own business in such a way. There the jurisdictional nexus for such business is elsewhere, not New York, which warrants allocation there for other and different reasons and which deprives New York of its allocation even though orders may be approved in New York. Similarly, there is no merit for appellant's bald assertion that New York has "dictated" appellant's business decision by taxation. This is idle sophistry, since New York has done no such thing any more than it has with respect to appellant's election to use its *own* warehouses elsewhere for which full allocation is obtained.

We submit by reason of the different kinds of business transactions involved between the two methods of distribution and the legal consequences thereof that rational distinctions exist which not only constitutionally justifies, but warrants a taxable classification between public warehouses and appellant's own warehouses for sales receipts purposes. This has been done by regulations pursuant to and in accordance with the statute, both of which recognize business sales receipts such as appellant's, as separate and apart from the storage business of public warehousemen. Therefore, they are not so disparate, relative to the classification, as to be wholly arbitrary—consequently, such

classification neither denies equal protection of the laws nor due process. See *e.g.*, *Walters* v. *City of St. Louis*, 347 U. S. 231, 237; *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522. As to the former, appellant is treated precisely the same as all other corporations, foreign or domestic, similarly situated, and, as to the latter, there has been no arbitrary discrimination whatever. We also submit that none of appellant's citations relied upon as tending to show its constitutional deprivation are applicable here. They are all clearly irrelevant, factually and legally, to the circumstances present here and do not support appellant's contentions that substantial Federal questions are involved in this proceeding. The case of *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U. S. 123, for example, has been long since isolated by reason of its peculiar circumstances, as its opinion makes quite clear. For one thing, that case, involving only one factor, is authority only for the ruling that income attributable to the taxing state was out of all appropriate proportion to the business done there, which is certainly not the case here. Secondly, as to the circumstances here, that case has been disposed of by *Butler Bros.* v. *McColgan*, 315 U. S. 501, 507.

In conclusion, we point, so far as the property factor is concerned under the formula (N. Y. Tax Law § 210[3][a][1]), appellant's property located at public warehouses is and has been excluded therefrom by appellee's regulations (Art. 411). This is not disputed, of course, by the appellant. This exclusion is in full recognition of the foreign situs of property located at such places outside the State and beyond its jurisdiction. Thus the statute provides (Tax Law § 210[3][a][1]):

> "ascertaining the percentage which the average value of the taxpayer's real and tangible personal property within the state during the period covered by its re-

port bears to the average value of all the taxpayer's real and tangible personal property wherever situated during such period."

Pursuant thereto, the regulations treat out-of-state public warehouses as "regular" places of business for property factor purposes and not as "permanent or continuous" places of business "maintained" by a taxpayer, as follows (Art. 411):

"Art. 411. Computation of Business Allocation Percentage. If the taxpayer did not have a regular place of business outside New York during the period covered by the report, its business allocation percentage is 100%; in other words, the taxpayer may not allocate any of its business income or capital outside New York.

A regular place of business is any *bona fide* office (other than a statutory office), factory, warehouse, or other space which is regularly used by the taxpayer in carrying on its business. Where as a regular course of business, property of the taxpayer is stored by it in a public warehouse until it is shipped to customers, such warehouse is considered a regular place of business of the taxpayer and, where as a regular course of business, raw material or partially finished goods of a taxpayer are delivered to an independent contractor to be converted, processed, finished or improved, and the finished goods remain in the possession of the independent contractor until shipped to customers, the plant of such independent contractor is considered a regular place of business of the taxpayer. (Compare, *permanent or continuous place of business*, Art. 413[2].)

A taxpayer does not have a regular place of business outside the state solely by consigning goods to an independent factor outside the state for sale at the consignee's discretion.

If the taxpayer had a regular place of business outside New York during the period covered by the re-

port, its business allocation percentage is generally computed on the basis of its

(1) real and tangible personal property (including real property rented to it) within and without New York (Art. 412, 412[1]),

(2) business receipts within and without New York (Art. 413), and

(3) payrolls within and without New York (Art. 414).

The business allocation percentage is computed by adding together the percentages of the taxpayer's real and tangible personal property, business receipts and payrolls within New York during the period covered by the report, and dividing the total of such percentages by three. However, if one of the factors (property, receipts or payrolls) is missing, the other two percentages are added and the sum is divided by two, and if two of the factors are missing, the remaining percentage is the business allocation percentage. (A factor is not missing merely because its numerator is zero, but it is missing if both its numerator *and* its denominator are zero.)

Example: A taxpayer owns no real or tangible personal property and rents no real property either within or without the state. The property factor being missing, the business allocation percentage may be computed by adding the percentages derived from the allocation of its receipts and payrolls, and dividing the total by two.

If it appears that the business allocation percentage computed on the basis of all or any of the property-receipts-payroll factors does not properly reflect the activity, business, capital or income of the taxpayer in New York, the State Tax Commission may adjust the business allocation percentage, as set forth in Art. 415."

Here again rational distinctions exist for this particular differentiation.

CONCLUSION

The motion to dismiss the appeal should be granted, or, in the alternative, the order appealed from should be affirmed.

Dated: September 5, 1961.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1961

No. 301

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Appellant,

v.

THE STATE TAX COMMISSION OF THE
STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of New York

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Questions Presented

Appellee's motion to dismiss or affirm is directed entirely to a question that does not exist on and is foreign to this appeal, namely, whether the allocation formula pro-

vided for in Section 210.3 of the New York Tax Law, is constitutionally valid for Article 9-A franchise tax purposes, so that appellant's receipts from sales of merchandise stored in public warehouses outside the State of New York must be allocated to New York. The question which appellee thus presents involves the jurisdiction of New York to impose its corporate franchise tax on receipts from the foregoing sales. Appellant did not, however, challenge in the courts below, and does not challenge in this Court, the power of New York to tax the sales receipts in question under a statute properly directed to that end.

The real questions presented on this appeal are set forth accurately on pages 3 and 4 of appellant's Jurisdictional Statement. They involve the precise issue whether, for Article 9-A franchise tax purposes, the State of New York—by action of its Legislature, of appellee, or of both —has, notwithstanding the equal protection and due process provisions of the Fourteenth Amendment, validly exercised its power to classify for tax purposes in prohibiting or barring every public warehouse outside the State of New York from being a "permanent or continuous place of business maintained by the taxpayer", as set forth in Section 210.3(a)(2)(B) of the Tax Law. The substance of appellant's constitutional challenge may be summarized as follows: If X, a New York corporation, maintains its own warehouse, for example, in New Jersey that warehouse is a "permanent or continuous place of business maintained by the taxpayer" outside New York; and even if orders for sales of merchandise stored at that warehouse *are accepted in New York*, then, under Section 210.3(a)(2)(B) of the Tax Law, receipts from such sales are *not allocable to New York for Article 9-A franchise tax purposes.* Appellant contends that because X is not required to pay New York franchise tax on such receipts, appellant (who uti-

lizes a public warehouse in New Jersey which is automatically treated as not being a "permanent or common place of business maintained by the taxpayer" outside New York, but in all other basic respects, operates the same way as does X) also should not be required to do so—*even though the State of New York may have constitutional power to tax both X and appellant on both such receipts under a proper statute.* Thus, appellant contends that New York has made an unreasonable classification in imposing a tax on appellant's receipts from sales out of the public warehouse and not on X's receipts from sales out of its own warehouse.

The State in which an order is accepted has no bearing whatsoever on whether a place of business outside New York is or is not a "permanent or continuous place of business maintained by the taxpayer without the state" of New York as referred to in Section 210.3(a)(2)(B) of the Tax Law. Hence, where an order is accepted has no relevance whatsoever to the validity of the equal protection and due process challenges squarely presented by appellant on this appeal—despite appellee's labored effort to the contrary. Appellee's attempt to turn appellant's appeal into a challenge against the power or jurisdiction of New York under a proper statute or against the constitutional validity of the aforementioned allocation formula itself is, therefore, nothing more than an *ignis fatuus* which should not be followed by this Court in giving attention to the real questions on this appeal.

Statement of Facts

Appellee charges that appellant has made an incomplete statement of facts, tending to create misleading factual and legal inferences (Appellee's Motion, p. 2). Wherein is appellant's statement of facts allegedly incomplete?

Appellant did not expressly state that the orders for merchandise stored in the public warehouses in Florida, New Jersey, and Ohio had been accepted in New York. Also, appellant did not recite that, during 1950 to 1954, it had its own rented warehouses operated by its own employees in foreign States other than Florida, New Jersey, and Ohio, and that receipts of sales of merchandise from such rented warehouses were not allocated by appellee to New York (Appellee's Motion, p. 5). Appellant, of course, does not deny that, in the main, the orders for merchandise stored in the public warehouses in Florida, New Jersey, and Ohio had been accepted in New York (R. 54, 71-73). Likewise, appellant does not deny that it had its own rented warehouses (R. pp. 64-65) in some States other than New Jersey, Ohio and Florida.

As will be shown below, allocation of sales receipts to New York is not required, even though the covering orders are accepted in New York, where the merchandise is stored and appropriated to customers at a permanent or continuous place of business maintained by the taxpayer outside of New York. Therefore, the sales from appellant's rented warehouses in foreign States were not allocated to New York *not because the orders had been accepted outside the State of New York, but because those warehouses were permanent or continuous places of business maintained by appellant outside the State of New York.* Furthermore, if the public warehouses in Florida, New Jersey, and Ohio, utilized by appellant during the calendar years 1950 to 1954, must, under the facts of this case, be constitutionally treated as if they were permanent or continuous places of business maintained by appellant outside New York, no allocation to New York of receipts of sales of merchandise stored at those warehouses can be made, even though the orders were concededly accepted in New York.

Accordingly, the existence of appellant's rented warehouses and the acceptance of orders in New York are legally irrelevant in view of the constitutional questions presented on this appeal. Omission of those items from appellant's factual statement cannot, therefore, create any misleading factual and legal inferences favorable to appellant's cause.

The Equal Protection and Due Process Questions are Substantial.

Inasmuch as appellee has erroneously stated the question at issue as being one of the jurisdiction of New York to tax, all of Appellee's argument (Appellee's Motion, pp. 6-16) is unresponsive to the serious federal constitutional questions raised by appellant (Jurisdictional Statement, pp. 8-21). In substance, appellee's sole point is that the three factor *allocation* formula under Section 210.3 of the Tax Law is fair and constitutional, so that appellant has not been required to pay an unfair amount of franchise tax. Stripped to its core, appellee's argument is simply that, because the sales of merchandise stored in public warehouses in Florida, New Jersey, and Ohio were made on orders accepted at Long Island City, New York, receipts from such sales were properly allocated to New York.

Appellee describes appellant's position as stemming from a misunderstanding of the taxing concepts involved in New York's franchise tax formula, which misunderstanding gives rise to appellant's erroneous construction of the statute and regulations (Appellee's Motion, p. 7). Frankly, if there is any misunderstanding of what this controversy is about, it is appellee's not appellant's. New York, through Section 210.3(a)(2)(B) of its Tax Law, provides that even if orders are accepted in New York, there is no allocation to New York of receipts from sales made out

of a permanent or continuous place of business maintained by the taxpayer outside the State of New York. Furthermore, Examples 3 and 4 of Article 413(2), Regulations 9-A, quoted in full on page 10 of appellee's Motion, clearly indicate that *the acceptance of orders in the State of New York does not of itself require allocation to New York of sales receipts.*

Accordingly, citation by appellee (Appellee's Motion, pp. 6, 8) of such decisions as *Norton Co.* v. *Dept. of Revenue of Illinois,* 340 U.S. 534 (taxation of local, as distinguished from interstate, business); *Butler Bros.* v. *McColgan,* 315 U.S. 501 (fairness of an allocation formula); *Bourjois, Inc.* v. *Chapman,* 301 U.S. 183 (regulation of sale of cosmetics); *Scripto, Inc.* v. *Carson,* 362 U.S. 207 (State use tax on local sales made by nonresident foreign corporation); *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435 (corporate privilege dividend tax on foreign corporation related to its local business); and *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450 (nondiscriminatory income taxation of net income from solely interstate business), is wide of the mark. In *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, Ohio was permitted to exempt from property tax certain property stored in Ohio by nonresidents. In *Walters* v. *City of St. Louis,* 347 U. S. 231 this Court did not pass on the equal protection issue in the actual operation of the challenged statute.

Although all of the foregoing decisions deal with jurisdiction to impose taxation, not one involves any issue comparable to the equal protection and due process issues raised in this case because of the unreasonable classification effected by appellee and sustained by the courts below.

Appellee's argument, beginning on page 11 and continuing to page 14, is sheer double talk. If Section 210.3(a)(2)(B) of the Tax Law and Examples 3 and 4 of Article 413(2), Regulations 9-A mean anything, they certainly mean that it is utter nonsense for one to contend that, because appellant did have some of its own rented warehouses outside New York where orders were accepted

outside New York, there is a basic distinction, *for purposes of this lawsuit,* between that type of operation and the public warehouse operation which gave rise to this lawsuit. What would the appellee's position be if the orders, with respect to the warehouses rented by appellant, had been accepted in New York? The answer is that all of appellee's argument, beginning on page 11 and ending on page 14, would completely disappear for the simple reason that even if the orders had been accepted in New York, receipts of sales of merchandise stored at the rented warehouses would not have been allocated to New York. Furthermore, whether appellant is constitutionally entitled to the relief here sought is in no way dependent on whether or not it had rented warehouses in other States.

Appellee states, for example, that there is no indication in the record as to what kinds of taxes the appellant paid to the States of New Jersey, Florida, and Ohio (Appellee's Motion, p. 6), and that, apparently, appellant did not want to "localize" its business in New Jersey, Florida, and Ohio (Appellee's Motion, p. 12). A complete answer to these contentions can be found in the testimony of appellant's Tax Manager (R., pp. 74-76), wherein the nature of the taxes paid by appellant to the States of New Jersey, Florida, and Ohio is clearly shown, and where also it is definitely shown that appellant is qualified to do business in Florida and Ohio, and, of course, in New Jersey, where it is incorporated. Actually, however, appellant is entitled to due process and equal protection of the laws against the unreasonable classification here complained of regardless of the amount or kinds of taxes paid by appellant to New Jersey, Florida, or Ohio and regardless of whether or not it is qualified to do business in any or all of those States.

Appellee's argument, beginning on page 14 and continuing through page 16, is again completely irrelevant to the equal protection and due process issues of this case. That portion of appellee's argument is directed to the ir-

relevant point that the allocation formula itself is fair—otherwise, why would appellee discuss the so-called property factor which is not in controversy here?

Appellant is not contending that the principle of the allocation formula itself under Section 210.3 is unfair. It is contending—which appellee is consistently ignoring, wittingly or unwittingly—that, under appellee's application of that formula to appellant in the light of the facts of this case, appellant's constitutional rights have been impaired. Appellant is contending, as it did in the courts below, that it is unconstitutional, under the equal protection and due process provisions of the Fourteenth Amendment, for the State of New York to provide that because taxpayer A utilizes a public warehouse outside the State of New York, but in all other respects operates with the same permanence and continuity as taxpayer B who utilizes a warehouse (which it owns or rents) outside the State of New York, taxpayer A must pay a higher tax than taxpayer B solely because of the use of the public warehouse. In each case the inventory is located and appropriated to customers *outside New York* but the orders are accepted *in New York*. To attach *automatically*, therefore, to the use of a public warehouse outside New York, the price of a higher franchise tax, is, appellant respectfully contends, an unreasonable exercise by the State of New York of its power of classification without rational basis justifying such a distinction. If such classification is not unconstitutional under the equal protection or due process provisions of the Fourteenth Amendment, then, appellant respectfully submits, the various decisions of this Court, cited on pages 8, 14, and 15 of the Jurisdictional Statement, no longer represent the law and should be overruled by this Court in a formal decision. It is appellant's contention, however, that those decisions still represent the views of this Court, and, therefore, appellant's position in this case must be upheld.

Appellant will not repeat here what it has said in its Jurisdictional Statement as to the substantial doubts of

the constitutional validity of appellee's action. Nothing said in appellee's Motion to Dismiss or Affirm in any way diminishes those doubts. Appellee has furnished no real argument in support of the correctness of the decision of the court below. Accordingly, Appellee's Motion to Dismiss or Affirm should be denied.

The question of proper classification, as presented in this case under the equal protection and due process clauses, is novel. Neither the cases cited by appellee nor, in substance, any part of appellee's argument is directed to that question. Being a clear and specific question under the equal protection and due process clauses which was squarely passed upon by the courts below, it is one on which appeal lies to this Court under 28 U.S.C. Section 1257(2).

Conclusion

Appellant respectfully submits that the Court should deny, in its entirety, Appellee's Motion to Dismiss or Affirm, and that, because the decision below is erroneous and the constitutional questions presented by this appeal are substantial, novel and of public importance, the Court should take jurisdiction of this appeal.

Respectfully submitted,

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